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ABSTRACT

Significant changes in United States culture during the past 25 years and court decisions resulting from legal suits challenging traditional educational procedures have made the future course of education very unpredictable. The social unrest of the 1960s brought about innovations such as open classrooms and nongrading systems in the wake of increasing awareness of ethnic and disadvantaged groups and individual rights. During the 1970s increased government legislation to ensure individual rights and equal opportunities resulted in "A Bill of Rights for Children" ensuring protection under the law. Many precedent-setting court cases have maintained that students do not shed their constitutional rights at the schoolhouse door in cases of suspension or discipline. While the courts recognize the right of schools to maintain order, they will intervene where students have been denied constitutional rights of due process, freedom of speech, or the right to privacy. In the 1980s, educators need to be aware of the prominence of the children's rights issue and the implications that may arise from cases where schools are held liable for the academic failure of individual students. (HTH)

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Children's Liberation: An Educational Dilemma in the Making

Dennie D. Butterfield

One of the major criticisms of todays American schools stems from those who are dissatisfied with "the way it is." They regard schools as sterile, lifeless, coercive, indifferent to the actual needs of children, and unable to meet the challenge of educating our children to the degree required by a changing and dynamic society.[1]

Although schools have experienced changes since Plato and Comenius, such changes were realized only after long periods of time. Indeed, until the 1950s it "...was the commonly accepted axiom that approximately fifty years were required for an educational innovation to gain full acceptance and implementation.[2] Prior to the 50s it was possible to forecast with a considerable degree of accuracy what the schools of the next decade would be like.[3] Now, however, it would be like playing Russian Roulette for one to attempt to predict what education will be like even one or two years in advance with a high degree of accuracy.

A Historical Perspective of Change

This difficulty in prediction has been caused by not only significant changes which have taken place in our culture over the past twenty-five years, but from dramatic interpretations and rulings relating to these actions, and further court decisions which have resulted from legal suits which have challenged traditional educational thoughts, philosophies and procedures.

While it is true that the history of educational change has typically reflected the forces of change brought about by a dissatisfaction with the existing social order, it was the launching of Sputnik which focused the attention of the entire nation directly on American education.

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The Sputnik Era

It was not until the end of World War II that American educational institutions were in a position for change. The nation had just emerged from sixteen years of economic depression and war. During that period we had lost sight of education as a force for societal welfare and had seriously neglected our school systems. Wartime testing had revealed an alarming lack of scientific and mathematical comprehension among high school graduates. As a result of these findings parents and communities throughout the country began to express concerns which was the beginning of significant change in our school systems.[4]

The launching of Sputnik in 1957, however, refocused public attention on the inadequacies of the educational systems throughout the country. Overnight, our society developed a fear and near paranoic reaction toward our shocking inability to compete with the Russians. How could a comparatively backward nation have developed the sophisticated technology required to surpass the United States? This frustration became a new source of American social concern which sought, and found an appropriate scapegoat in the public school system. Thus the advent of the space age created social pressures which forced sweeping and dramatic changes in school curriculum which are still being felt in school districts throughout the country.

In order to meet the demand for change as dictated by forces such as powerful pressure groups, militancy movements, best-selling books and magazine articles, federal and state legislators as well as those areas of need recognized by the profession itself, the era of the early sixties was marked by unrest and forced change in the educational profession.

The Legislative Era

The sixties also brought an increased awareness of the human and social problems facing our young people, ethnic and disadvantaged groups and those

concerned with individual rights. The "system" was rejected by many who felt alienated, overlooked and shut-out by those who had an assumed responsibility for their educational welfare.

In order to meet these new demands on the educational system, schools began to adopt "new" innovations, trends and practices such as open-space classrooms, team teaching, behavioral objectives, nongrading, programmed and individualized instruction, contract performance programs and accountability in the name of reform. These, and other innovations were usually accompanied or preceded by legislation which either encouraged or mandated change in the name of curriculum reform. Such changes were, as a result, viewed as either necessary to meet public and/or legislative demands on the schools, or as a panacea for all educational problems.

With such sweeping changes in curriculum development and implementation the seventies brought the beginnings of a great social revolution which impacted itself on American society and education resulting from social and student unrest of the sixties. This created an era of rapid and even more dramatic change on not only education, but within the society in which our schools functioned. Racism, more and more government involvement and control of education, desegregation of schools and society, student and teacher unrest and militancy, immigration of the black community from the south to northern and western cities, the extension of the civil rights movement to include the Chicano, American Indian, women and children, the urbanization of large city populations with resultant ghettos of the inner city are all factors which contributed to an era of unprecedented social and educational change. Each need was once again accompanied by a myriad of legislative enactments at both the state and federal levels designed to equate individual rights and insure equal opportunities. These enactments, however, were insufficient to quell the

deep dissatisfaction and accompanying unrest toward a social and educational system which was still unable to meet individual needs within the society.

The Judicial Era

In spite of the fact that there were many new laws written and enacted, there was still a great deal of misunderstanding and inability to enforce new legislation because of a lack of clear definition and legal interpretations from the courts. Even though court rulings did not prove to be a short cut, and precedent-setting decisions took years to reach and even longer to implement,* crucial social, educational and individual issues began to be addressed to the courts in an attempt to clarify, interpret and define the scope and limitations of legislation which dealt with individual rights within all segments of our society. As specific issues were increasingly before the courts, landmark decisions were issued by the courts which have created a greater amount of meaningful change in education, over a shorter amount of time, than ever before in American educational history.

Children's Rights: The Next Great Movement

Because of serious and increasing concerns over the manner in which children and students were treated by society, schools, the courts, parents and communities, a proliferation of court cases were initiated which deal directly with the issue of children's rights.

These concerns led to the writing of "A Bill of Rights for Children." This interesting document defines the rights of children as:

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*This is shown in the 1954 Brown v. Board of Education Supreme Court decision which ruled for school desegregation. After twenty-six years desegregation remains an issue as witnessed by recent Federal Court rulings of forced busing.

A child has the moral right and should have the legal right:

1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;

2. To be supported, maintained, and educated to the best of parental abiltiy, in return for which he has the moral duty to honor his father and mother;

3. To be regarded as a person, within the family, at school, and before the law;

4. To receive fair treatment from all in authority;

5. To be heard and listened to;

6. To earn and keep his own earnings;

7. To seek and obtain medical care and treatment and counseling;

8. To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interests would be served by the termination of parental authority;

9. To be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of the actual best interests of the child; and,

10. To receive special care, consideration, and protection in the administration of law or justice so that his best interests always are a paramount factor.[5]

A History of Children's Rights

Over the past twenty years the idea and theory of rights has proliferated the literature and thinking of the American people to a remarkable degree. Laws and interpretations of laws relative to personal rights have expanded at the same pace. Where courts were once reluctant to exercise their powers in the area of education and students, this reluctance has and is becoming a concern of the past. Although our legal knowledge in the area of children's rights is still in a state of change, there is gradually emerging a set of concrete rules which reveal educational liability and implications for the future. The remainder

of the paper will analyze precedent-setting court decisions which have had an impact on education and further develop an area which has great educational implications for the future.

Fair Treatment From All in Authority

In 1967 a fifteen year old boy was picked up and taken to the police station while his parents were still at work. No notice or specification of charges was given to the young man or his parents. He was not represented by counsel until after the adjudication. No record of the hearing was made; there was no confrontation of the witness against him; and heresay statements were accepted. He received an indeterminate sentence (possibly until age 21) for allegedly having made a "lewd phone call." This crime would have been classified as a misdemeanor for an adult who would have received due process under the law, fined from five to fifty dollars or serve up to two months in jail. Although the trial judge and state appellate court permitted the sentence to be made and stand, it was reversed by the Supreme Court who ruled that it was unfair to impose a more severe sentence upon a juvenile than would have been imposed upon an adult for the same crime.

In many situations the actions of other juvenile courts and schools have been just as arbitrary or unfair and have come under attack and redress from the courts. The decision determined that "kangaroo courts" could not be set up within the juvenile court system or schools. The most fundamental legal concept here revealed was the notion that juveniles (or students) are as entitled to the protections afforded by the constitution as their elders. The Supreme Court held that "...whatever may be their precise impact, neither the Fourteenth Ammendment or the Bill of Rights is for adults alone."[6]

This decision was followed by a second landmark case in 1969 which reinforced the Gault ruling and related specifically to the rights of students in the schools.

This precedent-setting decision stated that students do not "shed their constitutional rights at the school house door."[7] In Goss v. Lopez the Supreme Court further ruled that the interests of students facing possible suspension were also protected by the Due Process Clause of the Fourteenth Ammendment.[8] Although the judgment differentiated between academic and disciplinary dismissals, it held that a school could not withdraw the right to education on grounds of misconduct unless fundamentally fair procedure were used to determine whether misconduct had actually occurred. The student must be given oral or written notice of the charges against him, and if the charges are denied by the student he must be given an explanation of the evidence the authorities have and an opportunity to present his version.[9]

Schools were thus confronted with a new element of due process in considering student long term suspension. A North Carolina Court summarized the steps in legal procedural due process as:

1. Written notice to the parents and student(s) stating the specific charges which could lead to dismissal;

2. Adequate notice given of a full hearing before an impartial tribunal;

3. The right to examine evidence against the student;

4. The right to be represented by counsel although not at public expense;

5. The right to confront and examine adverse witness (usually involved only when conflicting evidence has been received;)

6. The right to present evidence on behalf of the student;

7. The right to make a record of the proceedings; and,

8. The requirements that decisions be based upon substantial evidence.[10]

With these and other rulings the schools were placed in the theoretical position of having to consider possible legal hearings in every case involving student long-term suspension, expulsion, or dismissal.

Due Process in Short Term Discipline

From previous discussion of specific rulings it seems clear that whenever students were denied access to the schools they were legally entitled to a hearing. With the procedures for term expulsion legally defined, teachers and administrators could then resort to short term suspension as a means of discipline. These control methods also came under the scrutiny of the courts.

In Hobson v. Bailey[11] it was held that a high school student could not be expelled for repeated absences from school in connection with his involvement in picketing without more than a short interview with an administrator. Once again the implications were that the student right to due process must be protected. He was entitled to a list of witnesses against him, and must be afforded an opportunity to defend himself through oral or written affidavits. A second ruling held that the school could not deny a high school senior a state diploma for cheating on an exam without allowing the student to have counsel,[12] while in still another case a second circuit court held that a student was not entitled to an attorney at a guidance conference held only to determine whether the student should be suspended, transferred to another school or be allowed to remain in his present school.[13]

Although most administrators and teachers have not been greatly affected by these rulings, there were rumblings and forced changes in the manner in which some arbitrary and capricious decisions had been made in exerting control over students without regard to their right to be treated equally and to receive due process in disciplinary actions.

These decisions show that while the courts fully recognize the need for and right of schools to maintain proper order, control and discipline on the school campus, they will intervene when it is shown there has been denial of

due process, discrimination, denial of constitutional rights, and/or administrative actions by teachers or adminstrators which are clearly arbitrary or capricious.

Concerns over due process have even had an impact in the area of classroom management. Although Goss v. Lopez established due process in cases involving suspension, the question of student suspension by the classroom has presented an area of unresolved concern. While only a few states permit teachers to suspend students from their classes, California has an Education Code section which states:

> A teacher may suspend an offending pupil from class for the day of the suspension and the day following.... The pupil may not be returned to the class during the period of the suspension without the concurrence of the teacher of the class and the principal.[14]

Because of an increase in student behavior and discipline problems there are movements to have similar policies adopted in states that do not have such a law in their statutes. A recent set of guidelines published by the National Education Association reinforced this need in stating:

> Whenever disruptive behavior severly threatens the physical or emotional well-being of the teacher or other children in the class, the disruptive child should be removed from the class.[15]

It seems clear that there is the need to extend this instrument of classroom control to the teacher, for it is at the classroom level that a majority of concerns which could justify suspension originate. Having the legal authority to suspend the student, however, presents many problems for the teacher. These problems, if unresolved, could open classroom management and discipline, which was the exclusive domain of the professional educator, to the influences of the courts. The legal right for the teacher to suspend the student must also provide answers to questions such as:

1. If the teacher suspends the disruptive student and sends him to the office by himself, can it be assumed that the student will actually go?

2. In providing for due process can the teacher, when confronted with a disruptive student, notify the student of the reason for suspension and permit the students to speak in his defense, call witnesses, cross-examine witnesses or appeal charges against him at the time of suspension?

3. If the student becomes angry or distraught when told to leave the class and injures himself or others, is the teacher liable?

4. Should the teacher leave the classroom unsupervised and escort the out-of-control-student to the office? Does such an action constitute teacher negligence, liability or a breach of professional responsibilities?[16]

In the consideration of due process procedural rights in the short term suspension there evolves a concern over teacher rights vs student rights which has yet to be fully resolved.

Freedom of Expression

As court rulings continued to clarify due process and it was found by students and parents that reform could be accomplished from within the system, the scope and number of cases expanded into more areas related to student rights. Included in this expansion were the areas of freedom of expression, which clarified student rights in relation to school and outside publications, and the selection and approval of speakers on campus as well as symbolic speech and protest.

Rulings in the area of freedom of expression clarified that students were not legally entitled to wear political buttons where the school board had shown that such wearing would actually provoke further racial tensions and violence.[17] Another decision disallowed the flying of a school flag at half mast in memory of four students who had been killed at Kent State University. The ruling stated that the flag could not be used to express a political concept "no matter how valid the cause or who is involved.[18]

Another significant case involving student rights ruled that a student editor could not be punished for refusing to obey a rule which prohibited the criticism of the state government in a school paper,[19] while a district rule relating to school newspapers which forbid the publication of a paid advertisement

against the Vietnam War because it was not a school related issue, and that the newspaper could only publish commercial ads was struck down. It was determined that such a rule unconstitutionally discriminated against nonmercantile ads and violated the students' rights guaranteed by the First Amendment to express themselves on matters intimately related to them through traditionally non-disruptive modes of communication.[20]

Of further significance to education was another decision which struck down as unconstitutional two sections of the California State Education Code. This ruling enjoined the Campbell Union High School Board from preventing students from distributing a newspaper on campus. The state statute prohibited the circulation of publications which were "sectarian, partisan or denominational in character or propaganda in nature, on public school grounds." The courts held that the statutes were so broad as to prohibit the distribution of innocent information such as leaflets explaining First Ammendment Rights, or a letter urging them to write their congressman.[21] In establishing the concept of freedom of expression in the Campbell Union case, the court again cited the following basic principle established by the landmark Tinker decision which said that students do not "shed their constitutional rights at the school house door."[22]

There are other areas in which the courts have issued rulings which have had a significant affect on education and schools. Specific rulings have given limited definitions to student and education rights in the areas of:

1. Protection of Fourth Ammendment rights against unlawful search and seizure of students and their property on school grounds;[23]
2. Student hair, dress and grooming standards;[24] and,
3. Invasion of student privacy regarding educational data.[25]

It must be noted at this point, that while the majority of these and other rulings which have come from the courts, seem to favor the students and have

served to clarify their rights, the courts have also issued many decisions which recognize and uphold the right of the teacher and administrator to maintain a degree of structure and control within the schools. The rulings have, overall, seemed to protect individual rights and provided safeguards necessary to protect the student from actions which are arbitrary and capricious in nature. It might take years for the courts to answer all of the problems involved in the vast number of legal interpretations inherent in such a complex area of personal rights. Educators, however, would do well to plan for the future by anticipating what past decisions and rulings have accomplished, and thus derive educational implications for the future.

Change is in the Air

The educator of the eighties must be a new breed. They must not only continue to be creative, innovative and flexible, but knowledgeable of the operation and intent of our legal and judicial systems. With the trends previously discussed, and the implications which past change portend for the future, there must be management theories which not only deal with the encouragement and implementation of change but also provide means and methods of directing and planning for and development of strategies which insure pragmatic implementation of new procedures and innovations.

Implications for the Future

The concept of rights is prominent in today's culture. We have become highly oriented toward,and concerned over personal, children's, students, women, property and consumer rights. Eberlein stated:

> To many Americans, rights have become more important than obligations. Suspicion has replaced trust and cooperation. In the world of work if a job application is rejected discrimination is charged; if someone else gets promoted, sexual bias is claimed. In medicine, if an operation is not successful, negligence is discussed with an attorney. Relating this same attitude toward education, when a teen-ager still cannot read the teacher is sued for malpractice.[25]

With this conditioned thinking the educational malpractice suit of the future thus becomes a reality with startling and frightening implications.

A Hypothetical Prophecy

In 1972, Saretsky and Mecklenburger developed a hypothetical situation which outlined an educational malpractice case. Utilizing legal procedents established in other cases involving education and a level of public dissatisfaction with many school systems, the legal situation was developed as follows:

Students who entered the first grade at George Washington School in 1968 were tested and found to be of normal intelligence and aptitude. Six years later, however, the following students needs were assessed:

1. Most could not read polysyllabic words, write a comprehensible paragraph or perform computations with three digit numbers;

2. Standardized achievement test scores revealed the entire class as measuring below national norms in science, social studies and reasoning skills; and,

3. An independent survey conducted by a neighborhood citizen's committee and executed by professional pollsters revealed that students perceived George Washington School as punitive, oppressive, dull and impersonal.

A group of parents and taxpayers decided to sue the school claiming that the school facilities, administrators, teaching staff, curriculum and instructional materials were of insufficient quality to provide an adequate education. Their suit contended that:

1. Compulsory attendance in education was a denial of liberty without due process;

2. The state and its agents have insufficient cause to continue to require attendance at the school since learning at George Washington was inadequate;

3. Parents should be allowed to withdraw their children from the school;

4. Tax dollars given to the school over the years involved an implied warranty from school authorities that adequate teaching and student learning would take place;

5. School authorities were in breach of their implied contract due to the inadequate learning which had taken place; and,

6. Future tax monies should be directed to other institutions more capable of providing adequate instruction.

The suit further stated that:

1. The school board had been negligent in their selection of inappropriate, obsolete and ineffective instructional materials and procedures;

2. Seven teachers were placed in teaching assignments inconsistent with their training;

3. Several classrooms were deficient in lighting and accoustics as measured against state department of education guidelines; and,

4. Despite several years of discouraging reports from parents, teachers and testing programs the school had taken no action to correct learning deficiencies resulting from its programs.

The citizens and parents asked that their specific grievances be ameliorated through the use of appropriate materials and that adequate teaching and physical learning environments be instituted at the school. They demanded that all staff inadequacies be remediated through teacher dismissals or retraining; and that successful educational programs in other schools be studied for possible implementation at George Washington. They argued that school authorities while acting in loco parentis (in place of the parents), had been negligent parents; and because years of inadequate treatment had caused irreparable damage to the self-confidence and self-image of the children, financial penalties should be levied against all those responsible. The suit finally asked that the school authorities be asked to pay a sum in excess of $10 million in damages. This sum was based on Department of Labor statistics which correlated elementary school performance with high school dropout rates and probable lifetime earning power lost to the entire class.[27]

Although many legal questions arise from a careful analysis of this hypothetical case, it is obvious that there would be serious implications for education

if such a case were to reach the courts. Historically, although courts have been reluctant to pursue fundamental issues in education where theory is complex, data meager and decisions extremely difficult, the growing unrest and dissatisfaction with the end product of our schools has forced the possibilities for such a case out of the hypothetical stage into the world of reality.

A Hypothetical Legal and Public Opinion

In 1970, Sandow invented another case in which John Brockman sued the Layfayette Board of Education for failure to provide him with learning skills implied by his having received a high school diploma. In this second hypothetical case it was argued that the diploma had no value because the graduate could not read at a seventh grade level. The jury in this instance agreed with the plaintiff and found the school district negligent and guilty of a tort.* The jury in this case, however, was one step above the hypothetical nature of this proposed case. It consisted of 200 respondents including privately practicing attorneys, state school officials, federal and state legislators, deans of law schools and legal counsels for private and public agencies. After receiving all facts relating to the proposed case, the "jury" ruled for the plaintiff and against the school. It was further significant in that 80 percent of this professional "jury" stated that they saw this case as an actuality and being successfully prosecuted within a five year period. They further stated that the probable basis for successful prosecution against the school would be negligence and implied contract.

The respondents determined that the defense in this future case would include the schools contention that there was no implied contract for guaranteed

*A tort is defined as a civil wrong for which the courts will provide relief in the form of an action for damages.

learning between the school and student due to the fact that education is not a commerce. Therefore, there could be no guarantee and hence no warranty. Some of the respondents, while feeling that the case would become an actuality, did not feel it would hold up in court.[28]

A Prediction Fulfilled

The prediction that the hypothetical case would be an actuality within five years was fulfilled in even less time. In 1972, Peter Doe graduated from high school. School records indicated that Peter was a caucasion with average or slightly higher than average intelligence. He had never been involved in any serious disciplinary problems and throughout his entire school career had maintained a record of average attendance while receiving average grades. At various times throughout his schooling his parents expressed concern over his apparent difficulties in reading, but were assured repeatedly that he was reading and writing at the average level and had no specific or unusual reading problem. Shortly after his graduation from high school Peter's parents had him examined and tested by two private reading specialists. These specialists concluded separately that the high school graduate was reading at approximately a fifth grade level as a functional illiterate. It was also revealed that Peter could not read a job application, fill out forms required by an automobile accident, and felt inadequate to hold any job which required reading skills.

The original complaint contended that as a result of acts and omissions of the defendants Peter had been deprived of an education in the basic skills of reading and writing and a decrease in earning capacity because his employment was limited to the most demeaning, low-paid manual labor jobs which required no ability to read or write, and that the plaintiff had suffered mental distress, pain and suffering.

The main complaint was issued against the San Francisco Unified School District, its Board of Education and Superintendent of Schools; the State Department of Education; the State Superintendent of Public Instruction; and 100 defendants alleged to be agents or employees of public agencies. The suit claimed negligence as central to its complaint along with seven other grounds cited to prove school district liability which were listed as:

> In addition to the general negligence claim, the other six include: (2) Misrepresentation--defendants falsely and fraudulently represented to the parents of Peter Doe that their son was performing at or near grade level in basic academic skills and was not in need of any special or remedial assistance, whereas, in fact, Peter was performing drastically below grade level and in need of special assistance; (3) Breach of Statutory Duty--defendants violated relevant provisions of the California Education Code charging school authorities with the duty of keeping parents accurately advised as to the educational progress of their children and that without such accurate information plaintiff's parents were unable to take action to protect their minor son from the harm suffered; (4) Breach of Constitutional and Statutory Duty--defendants violated relevant provisions of the above charging them with the duty to educate plaintiff and other students with the basic skills of reading and writing; (5) Breach of Statutory Duty--defendants violated relevant provisions of the California Education Code providing that no pupil shall receive a diploma or graduate from high school without meeting minimum standards of proficiency in basic academic skills; (6) Breach of Statutory Duty--defendants violated provisions of the California Education Code requiring inspection and revision of curriculum and operation of the schools to promote the education of pupils enrolled therein; (7) Breach of Statutory Duty--defendants violated relevant provisions of California Education Code requiring school districts to design the course of instruction to meet the needs of the individual pupils.[29]

The suit further contended that the defendants by acts and omissions had deprived the plaintiff of an education guaranteed by the U.S. Constitution and the laws and constitution of the State of California.[30] Although the first complaint sought punitive damages in the amount of $500,000, it was later amended to the amount of $1,000,000.[31]

The district argument that the facts did not constitute a cause of action was upheld in the lower court, while the court of appeal found an absense of any common law or statutory duty on the part of the school district to provide Peter with a certain level of skill.[32]

Although Peter's claims were dismissed and never brought before the courts, the many issues and questions raised by the hearings have not been dismissed or forgotten. Shannon stated that the principles laid down in this case would serve as a guide to future plaintiffs who would structure their pleadings to raise similar issues in different ways.[33] Once again a prediction for future educational legal implications was fulfilled when in 1977 Copiague Union Free School District was sued by a high school graduate for $5 million in damages and costs. Edward Donahue argued that he was entitled to receive a proper education as a third party beneficiary of a statutory duty defined under the New York State Constitution.[34]

Again in 1977, Richard John Fisher and parents filed a suit against the State of Washington, State Superintendent of Public Instruction and the Seattle School District. The suit also sought damages for Fisher's inability to secure steady full-time employment; for emotional distress, expenses incurred by the parents in providing for their son as a result of his inability to support himself; and, for costs of remedial instruction, at the expense of the defendants, until Fisher was able to read at the level required of a high school graduate; and for exemplary damages.[35]

Both cases cited were again dismissed by the courts. While the Donahue court declared that the facts of the case failed to state a claim and dismissed the case without further explanation, the Fisher case stated that "The plaintiff must establish that teachers, school districts, or the state itself, are bound by a duty to education, whether that duty be established under common law, contract or statute.[36]

The Fisher case, however, presented an interesting legal twist from the Seattle School District in their demurrer statement. While denying any contractual duty which bound them to provide the plaintiff with a certain reading skill level, the district filed a cross complaint against the Washington

State Superintendent of Public Instruction, the principal officers of the State House of Representatives and Senate, and the members of the State Board of Education. This cross-complaint alleged that the State had a paramount responsibility to provide for the education of school children in Washington and that the delegation of this duty to school districts was unconstitutional. The district alleged that as a result they had to fund programs through an undependable tax source. Because of these legislative mandates the school district sought indeminification should Fisher's suit prevail.[37] Although the suit was dismissed and never brought to court, the cross-complaint raised issues which must be answered in future claims and deliberations.

Thus far, the courts have been reluctant to recognize a tort in educational malpractice suits. While concluding in the case of Peter Doe, that the courts were unable to separate injury caused by a negligent school district from the physical, neurological, emotional, cultural and environmental factors that affect student learning they do not preclude the possibility that a future court claim could open a legal door which would recognize educational malpractice.*

Educational malpractice thus becomes a concern for educators in the near future. As previously stated by Shanno, the Peter Doe and other cases has opened a door from which future plaintiffs will enter pleadings which will raise similar issues in different ways.[38]

In discussing the malpractice hearings previously mentioned with lawyers and professors of law, it was their majority opinion that it is only a matter of time until the courts recognize the possibility of teacher, school, district or state malpractice and allow a case to actually go to court. Some of the

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*Any professional misconduct or unreasonable lack of skill or fidelity in the performance of professional or feduciary duties;...objectionable or wront practice.

different ways in which these similar issues relating to the student who fails to learn will be raised were listed as: (1) School or district negligence because of proven teacher incompetence. It was suggested by some lawyers that parents will increasingly utilize the services of outside teacher evaluators as a means of verifying whether or not a teacher is sufficiently trained or competent in subject areas, and ability to transmit learning effectively. These expert evaluator findings would be compared with previous evaluations conducted by principals, supervisors, etc., from within the school system. If the evaluations disagree, the professional expert's objective data based on measured student learning obtained from pre-post tests would be an acceptable form of evidence upon which a claim of teacher incompetence could be based.

If the evaluations agreed, evidence would have to be presented by the school or district showing what had been done to remediate teacher deficiencies or show cause why the teacher had not been dismissed or relieved of teaching responsibilities.

(2) Parents could elect to prove educational malpractice at an earlier school age rather than wait for the student to graduate with a high school diploma. If a student or class were to show a significant lack of learning growth over a one-year period than in previous years, that teacher could be pinpointed in a legal malpractice suit for negligence or failure to fulfill an implied contract for student learning.

(3) Item three of the Bill of Rights for Children previously quoted stated that a child has a moral and legal right to be regarded as a person, within the family, at school and before the law. Further rights include those to receive fair treatment from all in authority; to be heard and listened to, and to receive special care, considerations and protection in the administration of law or justice so that his interests are a paramount factor.[39]

There have already been cases in which school districts have been liable and negligent in the placement of students in classes for which they were not

physically adapted. As a result of such placements injuries occured and emotional concerns developed for which school negligence was ruled a contributing factor.[40] Parents able to prove that a student, as a result of placement in a particular class or with a certain teacher, had suffered mental or physical anguish, could conceivably open the possibility of negligence and malpractice for court consideration. This particular concern would be enhanced in the case where the parent had repeatedly requested a different class than the one assigned to his child, and a lack of learning was shown.

Another statement found in the Childrens Bill of Rights contends that the child has the right to emancipation from the parent-child relationship when that relationship has broken down, . . . and his best interests would be served by the termination of parental authority.[41] This creates further legal implications and concerns. Imagine the student who is dissatisfied with a placement in a particular course or teacher's class. The logical extension of this right would lead to the conclusion that an emancipation from the teacher-child or class-child relationship should be terminated because it was felt that the relationship had broken down. Such an interpretation could be further based on the last bill of right assumption that children have the right to receive special care and consideration in the administration of law or justice so that his best interests are a paramount factor.[42] If it can be shown that the child's best interests were not considered in a particular class or teacher placement, and that such placement interfered with or inhibited student learning, court interference could again be sought. Students would thus be extended the prerogative of freedom in the selection of classes and teachers. An additional burden in the already complex process of scheduling and balancing classes.

(4) In 1976 the Education for All Handicapped Act was enacted by the 94th Congress. (P.L. 94-152) The purpose of this particular legislation was to provide for the appropriate placement within the least restrictive environment of

all handicapped children in the United States. Inclusive within the intent of this legislation was the provision that the individual education programs (IEP) for each child contain specific instructional goals and learning objectives (IIP's) and means for measuring whether the specified objectives were being achieved by each handicapped child. Although teaching toward specified objectives has not been an issue yet implemented in all schools and classrooms, the threat from disgruntled parents, communities, legislators and students could bring the same educational procedures into the regular classroom. With a legislative mandate for prescribed and measured student learning over specified periods of time as a requirement, the possibilities of the educational malpractice looms again on the horizon.

It becomes increasingly clear that the courts could become a site for significant educational confrontations of the future. Past rulings have had a distinct effect on the manner in which decisions relating to students are made, while future decisions could impact sharply upon educational practices and procedures. Anticipation of this possibility brings us to the point of specific recommendations for future educational direction and policy development. Such recommendations would include:

(1) A total involvement approach on the part of all who are concerned with and directly affected by educational policies and procedures. Traditionally, school policies have been developed and implemented as a result of administrative recommendations, school board mandate and teacher enforcement. This required involvement would utilize a double-triad approach to provide for direct input from the student, parents, community and teachers as a basis for administrative recommendations submitted for school board approval and adoption. Such involvement would assure curricular relevance to actual proven needs prior to implementation of change;

(2) Development and implementation of reliable and valid measurement frameworks which would provide empirical data to justify proposed curricular innovation

and change;

(3) Willingness of educators to be accountable for student learning and mastery of the basics. This would include the responsibility of the profession to police itself through development of objective evaluation devices designed to eliminate the incompetent and negligent teacher who will be the focus of the educational malpractice suit of the future. Such evaluation frameworks, however, cannot be developed or implemented until school board, administrative and teacher associations are able to grasp a vision of the real need of education as being child-centered, and work cooperatively toward the end result of a true professional status;

(4) The evolvement of a curriculum which would extend the thinking and reasoning abilities of the student beyond the simplistic levels of mere knowledge, memorization and comprehension into the higher levels of synthesizing, original communication and evaluation. Only through such developed skills will we be able to produce a student clientele capable of thinking and reasoning within a student society based on the Bill of Rights for Children; and finally

(5) Further curricular implementations and training which would develop teaching skills for providing experiences to the student which would insure higher levels of student values and moral reasoning. A recent research project conducted at a private school revealed that students could not be expected to interact with others at high levels of moral reasoning unless provided experiences which would allow them opportunities to evaluate decisions involving values and moral reasoning. It was further shown that students involved reacted to moral dilemnas and decision-making at the lower levels and stages of Kohlberg's theory of moral development. Their decisions were motivated by fear of being caught, a desire to avoid punishment; or by self-interest reasoning based on the reciprocity syndrome of "What's-in-it-for-me". (i.e. Let's make a deal! You scratch my back and I'll scratch yours.) Although a few students were moti-

vated by desire for social approval gained through living up to a good boy/nice girl stereotyped image obtained through meeting the expectations of others, most decisions were based on a high level of egocentrism and fulfillment of self-wants.[43]

Much of the direction for education of the eighties and beyond will be provided by courts. Student rights will become an increasingly powerful factor as the children's advocacy movement initiates test cases which more clearly and fully interpret the scope of pupil rights in relation to educational expectations. If we are to meet our assumed and implied responsibilities for the educational welfare of our student clients we must develop their ability to think and reason at higher levels of cognitive and moral reasoning based on principles of internalized commitments which respect for rights and dignity of others--not an egocentric approach which limits the moral reasoning perspective to self-conceived and selfish needs. Although some homes from which our students come contribute to this needed level of moral responsibility, most do not. Schools, educators and students must be able to perceive rights based on moral agency, and ability to reason and act within a framework of rights as defined and motivated by respect, obedience, accountability for actions and self-governance ability. This can only be accomplished by providing the student with further experiences designed to allow opportunities to act, develop responsibility, and an honest evaluation and accountability for their actions. The many freedoms which will be extended to students in the future as a result of court rulings and decisions will be meaningless unless students are also provided with the freedom to think and reason.

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